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Note and Comment

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NOTE AND COMMENT

IS A DIVORCE GRANTED WHERE ONE ONLY OF THE PARTIES IS DOMICILED ENTITLED TO FULL FAITH AND CREDIT?—The case of *Haddock* v. *Haddock*, just decided (Apr. 16, 1906) by the Supreme Court of the United States, is one of very general interest and of great importance. The parties were married in New York and immediately separated, the wife remaining in New York, and the husband going to Connecticut where he acquired a *bona fide* domicil. Some thirteen years afterwards he secured a divorce from his wife for desertion, notice to her being by publication, in full compliance with the laws of Connecticut. Eighteen years later Mrs. Haddock sued her husband in New York and there obtained personal service upon him. He answered setting up, among other things, the Connecticut decree. The New York court refused to admit the judgment roll in the Connecticut proceedings, denying that that court had jurisdiction of the wife because notice was by publication and she had not appeared; the court decreed separation from bed and board and alimony, and this judgment was sustained by the Court of Appeals of New York.

"The Federal question is, Did the Court below violate the Constitution of the United States by refusing to give the decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?" The opinion of the court which gives a negative answer is by MR. JUSTICE WHITE, while MR. JUSTICE BROWN and MR. JUSTICE HOLMES write dissenting opinions, each concurring in the opinion of the other, and MR. JUSTICE HARLAN and MR. JUSTICE BREWER concur in both these dissenting opinions.

The opinion in part lays down the following propositions as established by the previous adjudications of the court:

First. The requirement of the Constitution is not that some, but that full faith and credit shall be given by States to the judicial decrees of other States. * * *

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service * * * such judgment may not be enforced in another State in virtue of the full faith and credit clause. * * *

Third. The principles, however, stated in the previous proposition are controlling only as to judgments *in personam* and do not relate to proceedings *in rem*. * * *

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution as regards their own citizens. * * *

Fifth. That a State where both are domiciled has jurisdiction to grant a divorce entitled to recognition in every other State by virtue of the full faith and credit clause, and this is true if one is there domiciled and the other appears.

Sixth. The domicil of matrimony is not changed to the new domicil of the husband when he abandons his wife, but the matrimonial domicil continues to be the wife's domicil till she acquires a new one.

Seventh. Where the domicil of the husband and the matrimonial domicil concur the unjustifiable absence of the wife therefrom may be disregarded, and the court of such domicil may grant the husband a divorce which is entitled to full faith and credit in the other States though notice to the wife is constructive only.

From this it follows: a. That no question of the right of Connecticut to give effect within its borders to this decree can arise. b. That from the sixth proposition the wife's domicil is New York. c. That as the wife was neither actually nor constructively domiciled in Connecticut, did not appear in the divorce proceedings and was only constructively served, the court of Connecticut had no jurisdiction of the wife under the fifth and seventh propositions.

Did then the domicil of the husband alone confer jurisdiction to render a decree against the wife which is entitled to full faith and credit in other States? Or would this be to enforce in one State a personal judgment rendered in another State which had no jurisdiction of the defendant?

It is elementary that no judgment is entitled to full faith and credit unless

rendered by a court having jurisdiction. As each State has power to determine the *status* of its citizens the domicil of one could not confer jurisdiction to render a decree entitled to full faith and credit, for thereby the non-domiciled party would have his *status* determined in the State of his domicil and the power of the latter would thus be rendered nugatory.

(From the foregoing summary the reader will readily see that the conclusion of the court rests upon the second of the preceding propositions as limited by the fourth.)

MR. JUSTICE BROWN refutes this statement by showing that the logical result of this would be that no State could fix the marital *status* even of its own domiciled citizen without acquiring jurisdiction of the person of the defendant. The opinion of the court also says that to give full faith and credit to a divorce granted upon constructive service upon the defendant by a court where only one party was domiciled would place all of the other States under the power of the State having the most liberal divorce laws.

Conceding this to be true and also conceding that the Federal government has no authority over the subject of marriage and divorce, it scarcely follows that these facts are very persuasive that the full faith and credit clause does not apply.

The principal point in controversy between the prevailing opinion and dissenting opinions is whether a divorce proceeding is one *in personam* or *in rem*, the majority regarding it as of the former kind and the minority considering it *in rem*.

If the proceeding, so far as it affects the *status*, be considered to be *in personam* the conclusion necessarily follows that the defendant who is not served within the jurisdiction, who does not appear and who is neither actually nor constructively within the jurisdiction cannot be affected no matter what steps may have been taken to bring him in. However, if the proceeding be one *in rem* the domicil of one party, constructive service upon the other and jurisdiction over the *res* will be enough, though here arises another difficulty. What is the *res?* Where is it? The view most commonly accepted is that the *res* is the marital relation or *status*. It would seem necessarily to follow that it is present *in its entirety* wherever either has a legal and *bona fide* domicil, so that the court of either domicil has jurisdiction to render a decree entitled to recognition in every other State, so far as the *status* and any property rights depending thereon are concerned. This conclusion seems to be a necessary corollary from the decisions in the State courts which, in the language of MR. JUSTICE BROWN, "Overwhelmingly preponderate in holding" that the court of the *bona fide* domicil of one party may grant a divorce "calling in the non-resident defendant by publication."

Even courts considering the proceeding to be one *in personam* must, I believe, recognize that a *res* is involved over which the court must have jurisdiction, for it is not believed that any court would recognize as valid a decree secured when both parties had submitted themselves to a jurisdiction where neither was domiciled, *Andrews* v. *Andrews*, 188 U. S. 14, at least if the question was so raised as to exclude the element of estoppel. *In re Ellis's Estate*, 55 Minn. 401; *Waldo* v. *Waldo*, 52 Mich. 94; *Kinnier* v. *Kinnier*, 45

N. Y. 435. Because jurisdiction over the person may be conferred by consent, but jurisdiction over the subject-matter cannot be so conferred. BISH. MAR. AND DIV., §§ 151-7. WHARTON CON. OF LAWS, 3rd ed., § 230. *Andrews* v. *Andrews supra,* and *Armitage* v. *Att'y General* (discussed later). Therefore it is not seen how if the *res* is divisible and attending each party, as MR. JUSTICE WHITE contends, the non-domiciled party could by his appearance confer jurisdiction over the *res* affecting him. *Armitage* v. *Att'y Gen. supra.* The conclusion that the *res* is entire and attends each individual seems irresistible. Then if the decree be regarded as *in rem,* so far as it affects the *status* and dependent rights, the domicil of one party will confer complete jurisdiction. This would seem to be the basis upon which must rest the decisions of the State courts which uphold the validity of foreign divorces. See cases cited in the opinion. [Some courts, however, seem to regard the *res* as the *status* of the domiciled party only or as the *status* of the parties in that State, though this view conflicts with the general doctrine that a person's *status* in such matters is determined by his domiciliary *status.*]

The theory of the entirety of the *status* finds abundant support in cases like *Cheever* v. *Wilson,* 9 Wall. 108, and *Jones* v. *Jones,* 108 N. Y. 415, where divorces granted in the domicil of only one of the parties, the other appearing in the proceeding, were regarded as entitled to extraterritorial force.

How does this case differ from *Atherton* v. *Atherton,* 181 U. S. 155? Only in this. In the latter case the husband had remained in the matrimonial domicil while in the present case he had acquired a new one. The rule that will permit the court of the wife's domicil in proceedings instituted by her to inquire whether she was justified in leaving the husband who has secured a divorce from her in his domicil, which was not the matrimonial domicil, but excludes such inquiry when his divorce was granted in his domicil, which was also the matrimonial domicil, is based upon a distinction too subtle for our understanding. The distinction cannot be that between proceedings *in rem* and *in personam.* If the court to which the husband resorted cannot conclusively determine in the former case that the wife left without justification, and so is constructively present, why is such determination conclusive in the latter? Why is one decree entitled to the sanction of the full faith and credit clause which is denied to the other? We say with MR. JUSTICE HOLMES, "I can see no ground for giving a less effect to the decree when the husband has changed his domicil after the separation has taken place.. * * * I have tried in vain to discover anything tending to show a distinction between that case (*Atherton* v. *Atherton*) and this."

What is the effect of *Haddock* v. *Haddock?* This question can be answered by examining the conditions obtaining before this decision was rendered, for in no case is a decree entitled to full faith and credit now that was not so entitled before. With the exception of cases where both parties are either actually or constructively within or the non-domiciled party submits himself to the jurisdiction of the court, the decree has only such effect in the other States as their ideas of comity and private international law impel them to give it. The practical result of the decision is largely to withdraw from divorce proceedings the sanction of the full faith and credit clause,

for almost without exception because of comity and independently of this constitutional provision the State courts have given at least partial, and many have given full faith and credit to decrees granted under the conditions named.

It follows that a person who has secured a divorce in the place of his domicil by constructive service upon the non-resident defendant who does not appear, and after his divorce remarries in the State of his domicil is the legal husband there of his second wife but is the lawful husband of his first wife in her domicil, so that intercourse with either woman is matrimonial or adulterous depending upon whether it occurs in the one State or the other. And should the first wife marry again in the State of her domicil she would be guilty of bigamy. *People* v. *Baker,* 76 N. Y. 78. Her issue there by her second husband would be illegitimate and the issue of her former husband born to his second wife in the jurisdiction granting the divorce, one would think could not be regarded as his legitimate children in the domicil of the former wife. However, in *Matter of Hall,* 61 App. Div. (N. Y.) 266, it was *said* that if one who had secured a divorce in North Dakota against a non-resident defendant, who had constructive notice only, and married again in North Dakota, her children born there by her second husband would be legitimate in New York, citing *Miller* v. *Miller,* 91 N. Y. 315. But this only increases the absurdity, while withholding the penalty from the innocent children, for it would make them her legitimate children though their father was not her husband. (Of course we recognize that such results are sometimes accomplished by *statutes* passed in the interest of the innocent offspring.) And thus we find if this be the law that the children of the petitioner who has remarried, and had children in the foreign State are legitimate in the State of the defendant's domicil, while if she has remarried and had children in her domicil, these children are bastards, and all as the result of a comity which is supposed to be largely determined by a desire to protect and safeguard the innocent citizen.

And further, as a person can secure a divorce which is unimpeachable only in the matrimonial domicil, or where both are domiciled he may utterly fail, for if he once leaves his matrimonial domicil and acquires a new one it is not conceivable that a return, however *bona fide,* to the matrimonial domicil would enable him to invoke the rule of *Atherton* v. *Atherton.* He would then be obliged to secure the same domicil as the defendant, a thing which the latter could easily prevent, to say nothing of the injustice of requiring him to make the attempt.

These difficulties are real, not imaginary, and they may excuse if not justify a feeling of disappointment and regret that the full faith and credit clause affords no relief.

It might not be out of place to mention in this connection the case of *Armitage* v. *Attorney General,* Times Law Reports, Feby. 22, 1906, recently decided in England, where it has attracted much attention. The president of the divorce division of the High Court of Justice was asked to declare the children of the petitioner legitimate. Mrs. Armitage had been Mrs. Gillig, having been married in London to Mr. Gillig, who lived there but was

domiciled in New York. Differences arose between them and Mrs. Gillig went to South Dakota and furnished a home. After three months' residence she instituted proceedings for a divorce. Mr. Gillig was personally served in London, entered an appearance, pleaded to the jurisdiction and to the merits and filed a cross-bill. In his answer he said he was a citizen of the United States, temporarily residing in England. He introduced no evidence, and Mrs. Gillig secured her divorce by default, returned to England, and seven months later married Mr. Armitage, by whom she had the children whose legitimacy it is desired to establish in this proceeding.

Mr. Gillig also remarried, and having again become unhappy he asked that his marriage be annulled on the ground that the South Dakota divorce was invalid. Mrs. Armitage testified that she had left England not intending to return, and had in good faith became a resident of South Dakota, and that Mr. Gillig had retained his New York domicil. The president said the question was whether he should recognize a divorce obtained in a state where the husband was not domiciled but which was recognized as a valid divorce in the state of his domicil because he had appeared in the proceeding. *Jones* v. *Jones*, 108 N. Y. 415. The court considers such importing of jurisdiction as absolutely ludicrous in English law, and insufficient unless the court had jurisdiction founded on domicil. However, as the court of the domicil of Mr. and Mrs. Gillig would regard the divorce as valid it would be so regarded in England.

The judge said in closing, "I wish to make one general observation. On this side of the Atlantic we have difficulties enough in dealing with questions arising in suits for divorce. But I think I am right in saying that throughout the British Empire there is a general recognition that it is the husband's domicil which decides the tribunal to try the cause. This principle enables the courts of our empire to deal with cases more simply than can the courts of the United States, for it is obvious that there are more difficulties in cases where questions of different jurisdictions arise, when a court has not one simple test of the husband's domicil to guide it. I can only hope that the efforts that are being made by the Commissioners on the Conference for the Uniformity of Legislation throughout the United States and the labors of the various societies having that object in view may successfully bring about a unified law in matters of divorce. Perhaps the publicity of this case will attract their notice."

The certainty so much desired by the learned judge has not been secured by *Haddock* v. *Haddock*, and we remain in a condition which is embarrassing, if not a reproach both at home and abroad.

If this case would have the effect of reducing the number of divorces it would be a result devoutly to be wished for, but it is submitted that it will be no more conducive to that result than was the barbarous treatment accorded to bastards at common law in reducing their number.

The effect upon the State courts whose rule has depended in part at least upon a belief that the decree was entitled to full faith and credit under the Constitution can only be guessed at, but it is not believed that it will change the rules that they have adopted, but it may have influence upon the rule to

be established in States where the questions have not been decided. Of course the courts whose attitude like that of New York has been consistently opposed to yielding recognition to foreign divorces will follow their previous decisions. F. L. S.

LIABILITY OF WATER COMPANIES FOR FIRE LOSSES.—In two recent articles published in this Review, the question of the liability of water companies for fire losses was somewhat exhaustively discussed. The majority of the actions wherein it has been sought to hold water companies liable for fire losses suffered by private property owners, have been brought for breach of contract. In a few cases the theory adopted was that the water company owed a duty to all property owners, by reason of the public character of its service; and the fact that it was under contract with the city to furnish an adequate water supply and pressure for fire protection, did not relieve it from liability in tort for any loss suffered by an inhabitant of the city through insufficient service. The Supreme Courts of Indiana, in *Fitch* v. *Seymour Water Co.*, 139 Ind. 214, Georgia, in *Fowler* v. *Athens City Water Works Co.*, 83 Ga. 219, and Mississippi, in *Wilkinson* v. *Light, Heat and Water Co.*, 78 Miss. 389, have repudiated this doctrine of liability in tort, though the Supreme Court of North Carolina, a most able and progressive court, has affirmed it, in *Fisher* v. *Greensboro Water Supply Co.*, 128 N. C. 375.

In a somewhat curious way, which it is not material to discuss here, the question of the validity of the judgment in the *Fisher case* got into the federal courts, and the United States Circuit Court, in *Guardian Trust & Deposit Co.* v. *Fisher*, 115 Fed. 184, made an independent examination of the grounds for the North Carolina judgment, holding that an action in tort would lie. This case was carried to the Supreme Court of the United States, and that tribunal has sustained the Circuit Court. *Guardian Trust & Deposit Co.* v. *Fisher*, 26 Sup. Ct. Rep. 186.

MR. JUSTICE BREWER, rendering the opinion of the court, said: "We are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company, contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the cit-

izens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

This decision is an important and far-reaching one, and may mark the beginning of a general movement among the courts to recognize the tort liability of water companies for fire losses due to insufficient water supply.

E. R. S.

DIVERSION OF SUBTERRANEAN PERCOLATING WATERS.—That the qualification lately given to the law respecting the extent of the owner's right to divert subterranean waters percolating through his land is being widely accepted in this country is indicated by a clear opinion rendered in the recent case of *Pence et al.* v. *Carney et al.*, Nov., 1905, — W. Va. —, 52 S. E. Rep. 702. In this case the plaintiffs were owners of land on which was a spring of valuable mineral water, and an expensive hotel frequented for the purpose of enjoying its medicinal and curative effects. Defendants owned adjoining land and, seeking to compete with plaintiffs, sunk a well and obtained a like water. The operation of a large steam pump, placed in defendants' well resulted in a complete cessation of the flow on plaintiffs' premises. On appeal from the action of the circuit court in sustaining the demurrer to plaintiffs' bill for an injunction, it was held that all subterranean waters are presumed to be percolating waters and that the owner of land who explores for, and produces subterranean water within the boundary of his land, is limited to a reasonable and beneficial use of such water, when to otherwise use it would result in the depletion of the water supply of the neighboring or adjoining land.

Underground waters are presumed to be percolating waters until it is shown that they exist in a known and well defined channel. *Taylor* v. *Welch* (1876), 6 Ore. 198; *Ocean Grove Ass'n* v. *Com'rs of Asbury Park* (1885), 40 N. J. Eq. 447, 450, 3 Atl. Rep. 168. And they are not recognized as flowing in such channels unless known to so exist, or their existence is ascertainable from surface indications or other means, without sub-surface excavations for that purpose. *Taylor* v. *Welch*, supra; *Lybe's Appeal* (1884), 106 Pa. St. 626, 634, 51 Am. Rep. 542; *Black* v. *Billymena Comm'rs* (1886), 17 Ir. L. R. 459, 474. Applying these rules, the court held the waters in controversy to be percolating waters. Having thus established their nature, the Supreme Court of West Virginia adopted the common law rule as qualified in the last few years by many well reasoned cases. The court indicates that it is a rule not peculiar to any jurisdiction but one that is applicable to all. The earlier American and the present English rule is that the owner of the soil may use percolating waters at pleasure, although in so doing he may drain or entirely divert such waters from the lands of adjacent or neighboring owners to

which they would otherwise pass. In other words, that a landowner has no natural right whatever to the supply of water resulting from percolation through another's land. *Acton* v. *Blundell* (1843), 12 MEES. & W., 324, 2 GRAY'S CASES 104; *Chasemore* v. *Richards* (1859), 7 H. L. CAS. 349; *New Riv. Co.* v. *Johnson* (1860), 6 JURIST N. S. 374; *Ewart* v. *Belfast Guardians* (1881), L. R. 9 Ir. 172. *Wheatley* v. *Baugh* (1855), 25 Pa. St. 528, 64 Am. Dec. 721; *Chatfield* v. *Wilson* (1855), 28 Vt. (2 Williams) 49; *Frazier* v. *Brown* (1861), 12 Oh. St. 294, 19 L. R. A. 99; *Phelps* v. *Nowlen* (1878), 72 N. Y. 39, 28 Am. Rep. 93; *Bloodgood* v. *Ayers* (1885), 37 Hun 356; *Ocean Grove* v. *Asbury Park*, supra. And such is held to be the law in this country in a number of recent decisions: *Miller* v. *Black Rock Springs Co.* (1901), 99 Va. 747, 40 S. E. Rep. 27; *Huber* v. *Merkel* (1903), 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589. GOULD ON WATERS, sec. 280. (3rd Ed.) The tendency of recent cases, however, is to limit the owner to a reasonable and beneficial use of percolating water when the proper enjoyment of the adjacent and neighboring lands is liable to be interfered with. 30 Am. and Eng. Enc. of Law (2nd Ed.), 314; *Bassett* v. *M'f'g. Co.* (1862), 43 N. H. 569, 577, 82 Am. Dec. 179; *Smith* v. *City of Brooklyn* (1897), 46 N. Y. Supp. 141; *Forbell* v. *City of N. Y.* (1900), 164 N. Y. 522, 58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; *Katz* v. *Walkinshaw* (1903), 141 Cal. 116, 70 Pac. Rep. 663, 99 Am. St. Rep. 66 (noted in 2 MICH. LAW REV. 403), *Stillwater* v. *Farmer* (1903), 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541, *Barclay* v. *Abraham* (1903), 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; *St. Amand* v. *Lehman* (1904), 120 Ga. 253, 47 S. E. Rep. 949. See FARNHAM, WATERS AND WATER RIGHTS, Vol. 3, p. 2717 et seq.

Previous to *Katz* v. *Walkinshaw*, supra, the common law doctrine of absolute and unqualified right in subterranean percolating waters was not questioned in those states where irrigation makes the subject of great importance. *Hansen* v. *McCue* (1871), 42 Cal. 303, 10 Am. Rep. 299; *Gould* v. *Eaton* (1896), 111 Cal. 639, 641, 44 Pac. 319, 52 Am. St. Rep. 201; *Willow Creek Irr. Co.* v. *Michael* (1900), 21 Utah 248.

Consistently with the rule that subsurface percolating waters belong absolutely to the owner of the land in which they are found, relief has been refused even where the diversion has been purely wanton and malicious. *Chatfield* v. *Wilson* (1855), 28 Vt. 49; *Frazier* v. *Brown* (1861), 12 Oh. St. 294; *Bradford* v. *Pickles* (1895), App. Cas. 587. But, in the words of *Bassett* v. *Co.*, supra, the injustice of the result when malice is present has led to an exception in several jurisdictions, that seems anomalous under the theory of absolute ownership they adopt.

The reasons repeatedly given for the old rule, are (1) that subterranean waters are so secret, changeable and uncontrollable that they cannot be subjected to the regulations of law, and that a system of rules such as has been applied to well defined streams, cannot be formulated without leading to irreconcilable conflict and confusion and (2) because such recognition of correlative rights would interfere with drainage, agriculture, mining and the progress of improvement generally.

However "secret, changeable and uncontrollable" percolating waters may

be, the effects of their unreasonable diversion have been but too apparent, as many of the cases cited above bear witness. And, as said in a well reasoned case on this subject, whether the deposition or detention of water in, or its removal from land is caused by a water-course, or by other means, can create ordinarily no difference in the effects of such deposition, detention or removal. It is believed that this objection is without sufficient force and merit to prevent interference by the courts in proper cases. "The courts can protect this particular species of property in water as effectually as water rights of any other description." *Katz* v. *Walkinshaw*, supra. Instead of involving the law of the subject in confusion and interfering with its application, the rule laid down is not only eminently just, but "exceedingly plain, certain, practical and easy to apply to real conditions." *Stillwater* v. *Farmer*, supra.

The second objection is based, apparently, on the assumption that if the property owner has not an absolute unfettered right, he has none at all. All courts recognize the rights of drainage, mining, agriculture, and all other rights of property in water, but a limit is sought to be imposed so that an owner may not unreasonably, or to no good purpose to himself, damage or deprive his neighbor of benefits he might otherwise enjoy. It is believed that a wise application of this qualification, where the facts demand, will facilitate the progress of improvement generally. Indeed, it seems to the writer that the conservation and prevention of waste sought in the cases laying down the doctrine here discussed have been rendered indispensable by the higher and greater demands of progress and improvement.

What is a reasonable use must depend, of course, on the facts of the particular case and the needs and business of the owner. *East* v. *Houston, etc., R. Co.* (Tex. Civ. App.). 77 S. W. 646. "It is not unreasonable that the owner should dig wells and take therefrom all the water he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve." *Forbell* v. *N. Y.*, supra. If the use is proper and reasonable, the old rule as unqualified, applies, and there is no liability for damages, however serious they may be. The injury is "damnum absque injuria." *Haldeman* v. *Bruckhart* (1863), 45 Pa. (9 Wright), 514, 84 Am. Dec. 511; *Lybe's Appeal*, supra.

"Percolating water is not an exception to the general rule that rights in organized society are not absolute, but correlative, and that one man cannot be permitted to exercise any right if the direct effect of his act will be an injury to his neighbor." The doctrine of correlative rights in percolating water is a sane one, and still another application of the old maxim: "Sic utere tuo ut alienum non laedas." D. G. E.

WOMEN AS NOTARIES PUBLIC.—The Supreme Court of New Hampshire advises the Governor that a woman is not qualified under the laws of that state to fill the office of Notary Public (*In re Opinion of the Justices*, 62 Atl. Rep. 969). In *Ricker's Petition*, 66 N. H. 207, 29 Atl. Rep. 559, 24 L. R. A. 740, the court had held that a woman might be admitted to practice as an attorney-at-law on the ground that, although an attorney-at-law is an officer

of the court, his employment is not a public governmental office to which the common-law disability of women attaches. But the court, in this case, said: "By our common law, women do not vote in town-meeting. The reason is that voting is an exercise of governmental power. For the same reason, and by the same law, they do not hold public office." In the determination of the present inquiry the sole question is stated by the court to be "whether a public notary, or notary public, is a public officer exercising some part, however small, of governmental power, executive, legislative or judicial." The court considers that the office of notary public is a public governmental office, that women are by the common law of the state disabled from holding office, and that no evidence of legislative purpose or intention to change this common law is found.

Long usage appears to have established the legal incapacity of women for the exercise of public functions. (*Chorlton* v. *Lings,* L. R. 4 C. P. 374; *Beresford-Hope* v. *Sandhurst,* 23 Q. B. D. 79). "On the whole we may say that, though it has no formulated theory about the position of women, a sure instinct has already guided the law to a general rule which will endure until our own time. As regards private rights women [who are sole] are on the same level as men, though postponed in the canons of inheritance; but public functions they have none. In the camp, at the council board, on the bench, in the jury box there is no place for them." (Poll. & Mait., Hist. Eng. L. I, 485).

Where the state constitution provides that a public officer shall possess the qualifications of an elector, and also requires that an elector shall be a male citizen of the United States, the legislature has no power to authorize the appointment of women as notaries (*State* v. *Adams,* 58 Ohio St. 612, 65 Am. St. R. 792, 41 L. R. A. 727), and even where the constitution is silent on the subject of sex in relation to public office, the nature of the office of notary public and the usage that has prevailed in making appointments to that office have been held to prevent the legislature from providing that women may be appointed notaries (*Opinion of the Justices,* 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350); though in *State* v. *Davidson,* 92 Tenn. 531, 20 L. R. A. 311, it is stated that the constitution is silent on the subject, and also that the legislature has the power to make women eligible to the office.

In some states the right of women to hold the office of notary public is conferred expressly by constitution or statute, as North Dakota (Rev. Co. 1899 § 462) and Wisconsin (St. 1898 § 173), in others it is conferred by implication, as in Michigan where, by an amendment, in 1887, to the statute relating to notaries public, it was provided that "no person shall be eligible to receive such appointment unless he or she shall be * * * a citizen of this state" (C. L. 1897 § 2629). Before 1887, however, women had been appointed notaries in Michigan and their right to the office appears not to have been questioned. Probably in some states a woman would be held not disqualified, irrespective of express constitutional or statutory provisions on the subject. *Von Dorn* v. *Mengedoht,* 41 Neb. 525; *United States* v. *Bixby,* 10 Biss. 520; *Harbour-Pitt Shoe Co.* v. *Dixon,* (Ky. 1901) 60 S. W. 186.